

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SPENCER PIERCE,
#61639

Plaintiff,

vs.

HOWARD SKOLNIK,

Defendant.

3:10-cv-0239-ECR-VPC

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted. (Docket #1). Based on the information regarding plaintiff's financial status in the Application to Proceed *in Forma Pauperis*, plaintiff is required to pay an initial installment of the filing fee pursuant to 28 U.S.C. §1915.

The grant of *in forma pauperis* status adjusts the amount of the filing fee that plaintiff must *prepay* -- plaintiff will be required to prepay an initial installment of \$3.33, instead of having to prepay the full \$350 filing fee for this action. The entire \$350 filing fee will, however, remain due from plaintiff, and the institution where plaintiff is incarcerated will collect money toward the payment of the full filing fee when petitioner's institutional account has a sufficient balance, pursuant to 28 U.S.C. §1915. The entire \$350 filing fee will remain due and payable, and will be collected from plaintiff's institutional account regardless of the outcome of this action.

The court now reviews the complaint.

I. Screening Standard

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a "formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's claims

1 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are
 2 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal
 3 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*
 4 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932
 5 F.2d 795, 798 (9th Cir. 1991).

6 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
 7 complained of was committed by a person acting under color of state law; and (2) that the conduct
 8 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689
 9 (9th Cir. 2006).

10 **II. Instant Complaint**

11 Plaintiff, who is incarcerated at Ely State Prison, has sued Nevada Department of
 12 Corrections (“NDOC”) Director Howard Skolnik, alleging deliberate indifference to his serious medical
 13 needs in violation of his Eighth Amendment rights.

14 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and
 15 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle*
 16 *v. Gamble*, 429 U.S. 97, 102 (1976). A detainee or prisoner’s claim of inadequate medical care does not
 17 constitute cruel and unusual punishment unless the mistreatment rises to the level of “deliberate
 18 indifference to serious medical needs.” *Id.* at 106. The “deliberate indifference” standard involves an
 19 objective and a subjective prong. First, the alleged deprivation must be, in objective terms, “sufficiently
 20 serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298
 21 (1991)). Second, the prison official must act with a “sufficiently culpable state of mind,” which entails
 22 more than mere negligence, but less than conduct undertaken for the very purpose of causing harm.
 23 *Farmer*, 511 U.S. at 837. A prison official does not act in a deliberately indifferent manner unless the
 24 official “knows of and disregards an excessive risk to inmate health or safety.” *Id.*

25 In applying this standard, the Ninth Circuit has held that before it can be said that a
 26 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be substantial.

1 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”
2 *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06.
3 “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does
4 not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
5 not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429
6 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v.*
7 *Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*,
8 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish
9 deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th
10 Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of
11 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

12 Delay of, or interference with, medical treatment can also amount to deliberate
13 indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898,
14 905 (9th Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122,
15 1131 (9th Cir. 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McGuckin v. Smith*, 974 F.2d
16 1050, 1059 (9th Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133,
17 (9th Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Where the
18 prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner
19 must show that the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at
20 1060; *Shapley v. Nev. Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (*per curiam*).

21 If the prison’s medical staff is not competent to examine, diagnose, and treat inmates’
22 medical problems, they must “refer prisoners to others who can.” *Hoptowit v. Ray*, 682 F.2d 1237, 1253
23 (9th Cir. 1982); *see also Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (*per curiam*);
24 *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-12 (9th Cir. 1986), abrogated in part on other grounds by
25 *Sandin v. Connor*, 515 U.S. 472 (1995).

1 While plaintiff alleges generally that various medical staff have been deliberately
2 indifferent to his serious medical needs including lower back and leg pain, and painful cramping dating
3 back to 2006, he only names Director Skolnik as a defendant. “Liability under [§] 1983 arises only upon
4 a showing of personal participation by the defendant. A supervisor is only liable for the constitutional
5 violations of . . . subordinates if the supervisor participated in or directed the violations, or knew of the
6 violations and failed to act to prevent them. There is no respondeat superior liability under [§] 1983.”
7 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted); *see also Hydrick v. Hunter*, 500
8 F.3d 978, 988 (9th Cir. 2007); *Ortez v. Washington County, State of Or.*, 88 F.3d 804, 809 (9th Cir. 1996)
9 (proper to dismiss where no allegations of knowledge of or participation in alleged violation). Plaintiff
10 does not allege that Director Skolnik had knowledge of or participated in any alleged civil rights
11 violation. All claims against Director Skolnik are dismissed with prejudice.

12 Accordingly, plaintiff’s complaint is dismissed. However, plaintiff’s allegations that
13 unidentified prison medical personnel have acted with deliberate indifference to his serious medical
14 needs may implicate his Eighth Amendments rights. Therefore, plaintiff has leave to file an amended
15 complaint. If plaintiff elects to proceed in this action by filing an amended complaint, he is advised that
16 he should specifically identify each defendant to the best of his ability, clarify what constitutional right
17 he believes each defendant has violated and support each claim with factual allegations about each
18 defendant’s actions. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative
19 link or connection between a defendant’s actions and the claimed deprivation. *Rizzo v. Good*, 423 U.S.
20 362 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v. Duffy*, 588 F.2d 740, 743
21 (9th Cir. 1978). Plaintiff’s claims must be set forth in short and plain terms, simply, concisely and
22 directly. *See Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R. Civ. P. 8. Plaintiff must
23 identify at least one of the defendants by name.

24 Plaintiff is informed that the court cannot refer to a prior pleading in order to make
25 plaintiff’s amended complaint complete. Local Rule 15-220 requires that an amended complaint be
26 complete in itself without reference to any prior pleading. This is because, as a general rule, an amended

1 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
2 plaintiff files an amended complaint, the original pleading no longer serves any function in the case.
3 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each
4 defendant must be sufficiently alleged.

5 **III. Conclusion**

6 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma*
7 *pauperis* (Docket #1) is **GRANTED**. Plaintiff Spencer Pierce, **Inmate No. 61639**, will be permitted
8 to maintain this action to conclusion without prepayment of the full filing fee. However, plaintiff must
9 pay an initial installment of the filing fee in the amount of **\$3.33**. Plaintiff will not be required to pay
10 fees or costs, other than the filing fee, or give security therefor. This Order granting *in forma pauperis*
11 status shall not extend to the issuance and service of subpoenas at government expense.

12 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
13 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
14 Prisoner Litigation Reform Act of 1996.

15 **IT IS FURTHER ORDERED** that plaintiff shall have **thirty (30) days** from the date
16 of entry of this order to have the initial installment of the filing fee, in the amount stated above, sent to
17 the Clerk in the manner described below. Failure to do so may result in the immediate dismissal of this
18 action.

19 **IT IS FURTHER ORDERED** that the Clerk shall **SEND** plaintiff two copies of this
20 Order. Plaintiff must make the necessary arrangements to have one copy of this Order, attached to a
21 check in the amount of the initial installment of the filing fee, sent to the Court, by sending a copy of the
22 Order with a "brass slip" to Inmate Services for issuance of the check.

23 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. §1915, as amended by the
24 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay the Clerk of
25 the United States District Court, District of Nevada, 20% of the preceding month's deposits to plaintiff's
26 account (in months that the account exceeds \$10.00), until the full \$350 filing fee has been paid for this

1 action. The Clerk shall send a copy of this order to Albert G. Peralta, Chief of Inmate Services,
2 Nevada Department of Prisons, P.O. Box 7011, Carson City, NV 89702.

3 **IT IS FURTHER ORDERED** that plaintiff's Complaint is **DISMISSED WITH**
4 **LEAVE TO AMEND.**

5 **IT IS FURTHER ORDERED** that plaintiff will have **thirty (30) days** from the date that
6 this Order is entered to file his amended complaint, if he believes he can correct the noted deficiencies.
7 The amended complaint must be a complete document in and of itself, and will supersede the original
8 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not
9 carried forward in the amended complaint will no longer be before the Court.

10 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint
11 as such by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint
12 Pursuant to 42 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **3:10-**
13 **CV-0239-ECR-VPC**, above the words "FIRST AMENDED" in the space for "Case No."

14 **IT IS FURTHER ORDERED** that plaintiff is expressly cautioned that if he does not
15 timely file an amended complaint in compliance with this order, this case may be immediately
16 dismissed.

17 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983
18 civil rights complaint form with instructions along with one copy of the original complaint.

19 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT** accordingly.

20 DATED this 6th day of July, 2010

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22 UNITED STATES DISTRICT JUDGE
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